IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No. 76- 76-1110

JOHN HARMER, RAYMOND P. GAUER, RICHARD WALTON,

Petitioners,

vs.

A MOTION PICTURE FILM ENTITLED, "THE DEVIL IN MISS JONES" (16 mm. Color, English Sound Track); MARVIN FILMS, INC.; MARVIN FRIEDLANDER; GERARD DAMIANO a.k.a. JERRY GERARD; MEATBALL PRODUCTIONS, INC.; HERBERT NITKE; PIERRE PRODUCTIONS, INC.; LOU PERAINO; PHIL PARISI; GERARD DAMIANO FILM PRODUCTIONS, INC.; TOPAR THEATERS, INC.; TOPAR FILMS, INC.; TOM PARKER; RICK PARKER; SALLEE PARKER; YALE THEATER; CAVE THEATER; CINE' CIENEGA THEATER; CORBIN THEATER; LEONARD STEINBERG; ABRAHAM HERSHENSON; SYLVIA HERSHENSON; TITLE INSURANCE AND TRUST CO., INC.; BANK OF CALIFORNIA; VICTOR E. KRONE; SYLVIA E. KRONE; LOUIS I. SOKOL; META M. SOKOL; THELMA RIFKIND; ROBERT GARNER; CORBIN THEATER, INC.; P. & M. THEATERS, INC.; CINE' CIENEGA CORPORATION; JOHN DOES 1 through 5,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL
SECOND APPELLATE DISTRICT (DIV. 3)

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PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL,

SECOND APPELLATE DISTRICT (DIV. 3)

The Petitioners, John Harmer, Raymond P. Gauer and Richard Walton respectfully pray that

a writ of certiorari issue to review the judgment by the Court of Appeal, Second Appellate District, Division Three; which reversed the judgment of dismissal in the trial court entered on September 13, 1973 (pursuant to that court's oral ruling from the bench on September 12, 1973, sustaining the demurrer to petitioners' complaint without leave to amend)[1/] and remanded the case to the trial court with instructions to grant plaintiffs a reasonable time within whereby to file an amended complaint.

OPINIONS BELOW

A copy of the opinion filed on September 17, 1976 in the Court of Appeal, Second Appellate District, Division Three, is attached hereto at Appendix "A". The California Supreme Court entered an order on November 12, 1976, denying a petition for hearing, without writing an opinion. A copy of such order is attached hereto at Appendix "A-22".

1/ See Clerk's Transcript (hereinafter designated "C.T.") at p. 267 and Reporter's Transcript of oral Ruling on September 12, 1973 (hereinafter designated "R.T.").

JURISDICTION

The order of the California Supreme Court denying the petition for hearing was entered on November 12, 1976. The petition for certiorari herein was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether the facts specifically pleaded in the Complaint indisputably established petitioners' right to a preliminary injunction, and whether in denying a prompt judicial forum in which to contest the right of the defendants to publicly exhibit for profit the hard-core sexual conduct depicted in the motion picture film described in the complaint, and exhibited continuously for four months prior to the filing of the action, the judicial system of the State of California has deprived the petitioners as citizens of the United States of:

(1) due process of law and equal protection of the law, and

(2) the police power which is inherent in municipal authority, and

(3) one of the fundamental civil rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values, and environment are free from the illegal, degrading, and corrupting influences of such patently hard-core pornography?

2. Whether it is a denial of due process of law to require petitioners to amend their pleadings before the judicial system will consider further the granting of the relief requested, where Division 1 of the same Court has ruled in a companion case entitled John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Film Entitled "Deep Throat" et al. (unreported), in an appeal taken from the sustaining of a demurrer to a cause of action involving identical pleadings, that (a) a cause of action has not been stated, and (b) that a cause of action can not be stated by amending the pleadings, and where the California Supreme Court has refused

to grant a hearing to resolve the conflict that exists between the two opinions.[2/]

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the First and Tenth Amendments to the Constitution are set forth in Appendix "C".

2/ A conflict exists between the decision of the Court of Appeal, Second Appellate District (Division 3) in John Harmer, Raymond P. Gauer, Richard Walton v. A Motion Picture Film Entitled "The Devil In Miss Jones" et al., 2d Civ 43778, decided September 17, 1976 (unreported), petition for hearing denied on November 12, 1976, under which the cause of action was remanded to the trial court with instructions to grant plaintiffs time within which to file an amended complaint, and the decision of the Court of Appeal, Second Appellate District (Division 1) in John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Film Entitled "Deep Throat" et al., 2d Civ 43913, decided December 10, 1976 (unreported), petition for hearing denied on February 3, 1977, which held to the contrary and affirmed the trial court's ruling which sustained the general demurrer to the cause of action below. A copy of the unreported opinion in "The Devil In Miss Jones" case, herein, is attached to this petition at Appendix "A" and a copy of the unreported opinion in the "Deep Throat" case is attached to this Petition at Appendix "B".

STATUTORY PROVISIONS INVOLVED

Chapter 7.5 of the Penal Code of California prohibits the sale, distribution, etc. of "obscene matter". Penal Code section 311(a), defining "obscene matter", is printed at Appendix "D".

Sections 3479 and 3480 of the Civil Code of California, containing the provisions defining what constitutes a civil public nuisance, are set forth at Appendix "E".

Sections 3493 and 3495 of the California Civil Code, authorizing the abatement of a public nuisance by a "private person" by a civil action and by other means (self-help) is printed at Appendix "F".

Section 731 of the Code of Civil Procedure of California, authorizing the filing of a civil public nuisance abatement action "by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance" is printed at Appendix "G".

Section 527 of the Code of Civil Procedure of California, containing the provisions relating to the granting of preliminary injunctions, is printed at Appendix "H".

Rule 977 of the California Rules of Court,

which prevents the citation of unreported decisions as precedent, is printed at Appendix "I".

STATEMENT OF THE CASE

Petitioners have sued to abate a moral public nuisance within the County of their residence. Two of the petitioners, Walton and Gauer, allege ownership of specifically identified real property upon which their residence is located. Petitioner Walton's real estate is identified in the Complaint as 819 Berkeley Street, Santa Monica (C.T. p. 2, line 17) which is within two blocks of the Yale Theater, one of the moral nuisances alleged, which is also identified in the Complaint as being located at 2838 Wilshire Boulevard, Santa Monica, California (C.T. p. 2, line 9). One of the petitioners, Harmer, alleges only his general residency in the County and his status as an elected official as a State Senator whose senatorial district is located within Los Angeles County.

The moral public nuisance is alleged to be in the form of a multi-headed "Hydra", one of whose heads is in the form of a movable property, being the master print of a pornographic motion picture film known as "The Devil In Miss

Jones", copies of which are being moved from theater to theater within Los Angeles County. Other "Hydra" heads which are alleged as existing within Los Angeles County are four pieces of fixed real estate at which the hard-core pornographic film "The Devil In Miss Jones" is continuously and commercially being exhibited to the public as a regular course of business. The last of the named "Hydra" heads is that group of individuals, both within and without the State, who control, manipulate, maintain and defend the aforementioned heads.[3/]

The Complaint herein was filed on August 3, 1973, and alleged that the moral nuisance first appeared in Hollywood, at the Cine' Cienega Theater, on April 13, 1973, almost four months prior to the date of filing of the Complaint (C.T. p. 25); that it next appeared in Santa Monica at the Yale Theater and in Hollywood, at the Cave Theater, on May 18, 1973 (C.T. p. 37, 49); and finally appeared in Tarzana, at the Corbin Theater, on July 20, 1973 (C.T. p.

3/ Several of the named out-of-state defendants were personally served with process while out of state. No attempt was made to perfect jurisdiction over them personally, under the "long-arm" statute, as to the trial court proceedings under review.

61), all within Los Angeles County. The Complaint also states that such exhibitions have continued uninterrupted up to the date of filing of the Complaint.[4/]

The graphic lewdness of the film "The Devil In Miss Jones" is irrefutably established in the specific pleadings and through the "Continuity" and "Time and Motion" Study of the same which were incorporated in the Complaint. See Judge Thomas' statement at page 8, supra, and Justice Potter's opinion (Appendix "A" herein at p. 2.)

4/ The opinion below erroneously reports this background of facts as: "The exhibition of the motion picture at each of these theatres is alleged to have been going on continuously for a period of several weeks..." (Our emphasis). Further, Appellants had informed this Court in their opening brief, filed in March of 1974 (which was 11 months after the first showing of "The Devil In Miss Jones"), that the film was still being exhibited at the abovementioned theatres. See pages 7 and 8 of Appellants' Opening Brief. That fact was advertised daily in the Los Angeles Times. Had any one of the Justices of Division 3 opened the Los Angeles Times to the film entertainment page on either the date of oral argument (Jan. 21, 1975) or the date of filing of its opinion (Jan. 31, 1975), the Court would have had notice of the fact that "The Devil In Miss Jones" was still being exhibited at the Cine' Cienega Theater in Hollywood and at the Corbin Theater in Tarzana. Evidence Code Sections 451(f), 452(g) and (h), 453(b), 459.

Representative of the entire content of this 95 minute pornographic film is the 4 minute, 12 second scene at Parts 13 and 14 of the Time and Motion Study (Photos, 857-954) showing two females orally copulating a male and exchanging his semen mouth to mouth, and a 2 minute, 52 second sequence at Parts 14 and 15 of the Time and Motion Study (Photos, 955-1018) in which one female engages a reclining male in sexual intercourse, while a second male performs anal sodomy on her from the rear. The content of the film is so gross and patently unlawful, the Master Calendar Judge, upon his own motion, ordered the Time and Motion Study and Continuity to be sealed, and sequestered the same, when the Petition to Abate was originally filed (TR. Instruction Sheet). Notwithstanding this infirmity, Defense Counsel Glassman volunteered the information to the Court of Appeal, at the conclusion of oral arguments on Jan. 21, 1974, that the District Attorney of Los Angeles County had abandoned his efforts on this matter. See Appendix "A" to Petition for Rehearing in the Court of Appeal at p.22.

The opinion of the Court of Appeal, Second Appellate District, Division 3 below holds that, assuming that the film "The Devil In

Miss Jones" is obscene, Plaintiff Walton, who owns real property within two blocks of the Yale Theater public nuisance, has failed to plead "special injury" for "standing" to abate as a moral nuisance the film and the building where the pornographic film is regularly being exhibited in a continuing course of conduct.[5/] The Court remanded the matter back to the trial court to permit Plaintiffs an opportunity to amend to show "special injury" sufficient to maintain a private suit to abate a public nuisance, and to state a cause of action for a declaratory judgment.[6/]

5/ Petitioners did not argue nor did the Court consider how the Common Law right of self-help permitted by Civil Code Section 3495 entered into its analysis.

6/ Petitioners have considerable difficulty with that part of the Court's opinion which states that "The first problem is that Plaintiffs have not alleged the existence of a controversy. There is no allegation at any point in their complaint to the effect that Defendants or any of them deny that the motion picture is obscene or deny that the exhibition of it is a public nuisance." This problem is one of this Court's creation. The issue was not raised at any time either by the Defendants or the court below. Further, as that Court knew, the record clearly shows an actual controversy, i.e., the Defendants persist in their claim of a constitutional right to exhibit the same and that as a matter of law the exhibitions are not illegal. See Defendants' Points and Authorities in support of their Demurrer at C.T., pp. 264, 265. Where the existence

After more than three years of litigation (See Statement of Facts, supra, at pp. 13-23), petitioners are being forced, once again, to run the gauntlet without an answer as to the specific pleadings, notwithstanding the fact that Division 1 of the same Court has ruled in a companion case entitled John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Entitled "Deep Throat" (unreported), in an appeal taken from the sustaining of a demurrer to a cause of action involving identical pleadings that a cause of action has not been stated and that such a cause of action cannot be stated by amending of the pleadings.

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of an actual controversy between the parties is apparent, the Complaint for Declaratory Relief is sufficient although there is no allegation of an actual controversy. Tolle v. Struve, 124 Cal.App. 263, 12 P.2d 361 (1932). Petitioners submit that, in view of the grave moral problem established by the Plaintiffs, the reviewing court as the guardian of public morals has the duty to apply a different rule of law. See CCP, Section 452; 15 Cal.Jur.2d "Declaratory Relief", Sections 32, 33, at p. 159, et seq.

Petitioners submit the issue is really one of "standing" and, based upon the community's right to "speak out", is one with constitutional dimensions. Where the "controversy" alleged is premised upon illegal public conduct which is ongoing and a "public" as well as a "private" right, what the subjective claim of Defendants may be is of little consequence.

Petitioners contend that the record herein, and in the companion "Deep Throat" case, both as to the specific pleadings regarding the nature of the content of "Devil In Miss Jones" and "Deep Throat" and the historical events surrounding those appeals, establish that petitioners have been effectively deprived of fundamental civil rights to speak out promptly in the Courtroom, via Civil lawsuits, against the proliferation in their community of such hard-core films.

STATEMENT OF FACTS

On August 3, 1973, Petitioners commenced a civil action in the Superior Court of Los Angeles County with the filing of:

1. A Complaint in Equity To Abate Public Nuisances, for Declaratory Judgments and Forfeitures (C.T., pp. 1-123).

2. Points and Authorities In Support of Complaint In Equity To Abate Public Nuisances, Declare Forfeitures, and for Declaratory Judgments; (C.T., pp. 124-255).

3. Motion For A Preliminary Injunction To Abate a Public and Private Nuisance, and For a Declaration of Forfeiture; and

4. Notice of Motion For a Preliminary

Injunction with a trial date of August 28, 1973, at 9:00 A.M., in Department 85 of said Court. In such civil action Petitioners, as residents and real property owners in Los Angeles County sought to abate as a public nuisance four so-called "porno" theaters in Los Angeles County wherein the hard-core pornographic film "The Devil In Miss Jones" had been exhibited as a continuing course of conduct namely, the Yale Theater at 2838 Wilshire Boulevard, Santa Monica, California; the Cave Theater at 6315 Hollywood Boulevard, Los Angeles, California; the Cine' Cienega Theater at 755 North La Cienega, Los Angeles, California; and the Corbin Theater at 19618 Ventura Boulevard, Tarzana, California, and the positive motion picture prints used by the defendant operators of said theaters as the means of exhibiting said motion picture film at those theaters. A time and motion study of the film, "The Devil In Miss Jones", consisting of a chronological series of still photographs, timed in their relative order of appearance, depicting the sexual conduct visually portrayed on the motion picture screens of those theaters and a "continuity" containing photographs and the dialogue of said film were attached to and pleaded specially at Exhibits A and B to said Complaint, and were ordered removed and ordered

sealed upon filing (See Instruction Sheet to Clerk's Transcript).

By written stipulation, filed with the Court on August 30, 1973 (C.T., pp. 256-257), the defendant film, A Motion Picture Film Entitled "The Devil In Miss Jones" and defendants Topar Theatres, Inc., Topar Films, Inc., Tom Parker, Rick Parker, Sallee Parker, Yale Theater, Cave Theater, Cine' Cienega Theater, Corbin Theater, Cine' Cienega Corporation and Corbin Theater, Inc., alleged to be the operators of said theaters, and the owners of certain of the real property on which said theaters are located, acknowledged service of said summons, complaint, motion for preliminary injunction and notice of motion for preliminary injunction on August 7, 1973, and the hearing of plaintiffs' motion for preliminary injunction was set over from August 28, 1973 to September 12, 1973, to permit defendants' counsel to file a demurrer, and a hearing was set for the same on September 12, 1973, to be heard before plaintiffs' motion for a preliminary injunction.

On August 30, 1973, defendants "The Devil In Miss Jones", Topar Theatres, Inc., Topar Films, Inc., Tom Parker, Rick Parker, Sallee Parker, Yale Theater, Cave Theater, Cine' Cienega Theater, and Corbin Theater filed a demurrer with the

Court and Points and Authorities in Support thereof, alleging that each of the five causes of action of said complaint failed to state facts sufficient to constitute a cause of action (C.T., pp. 258-266).

By stipulation, filed with the Court on September 6, 1973, defendants Leonard Steinberg, Victor E. Krone, Sylvia E. Krone, Louis I. Sokol, Meta M. Sokol and Thelma Rifkind, alleged to be the owners of the real property on which the Yale Theater is located, acknowledged service of process of said summons, complaint, motion for preliminary injunction and notice of motion for preliminary injunction on August 13, 1973, adopted the above-mentioned demurrer as their own, and entered a general appearance in the action. (See Petition for Writ of Mandate in Harmer et al. v. Superior Court, 2d Civ. 42966 at p. 4).

On September 7, 1973, plaintiffs filed with the Court the declaration of plaintiffs' attorney, Louis Morelli, wherein is stated the manner in which Morelli personally proceeded in obtaining the autoptical evidence lodged with the trial court as Plaintiffs' Proposed Trial Court Exhibits 1-4 in support of the motion for a preliminary injunction, being a "time and motion" study and

"continuity" of the film, "The Devil In Miss Jones", as exhibited at each of the four theaters named in the complaint and sought to be abated with said film as public and private nuisances. (See Petition for Writ of Mandate in Harmer et al. v. Superior Court, 2d Civ. 42966, at p. 5).

Plaintiffs' Proposed Trial Court Exhibits No. 1 through 4, being photographic exhibits with greater clarity and four times larger than the printed material appearing in the Complaint at Exhibit A, referred to in said declaration and lodged with the trial court on September 7, 1973, were lodged with the Clerk of the Court of Appeal with the Petition for Writ of Mandate in Harmer et al. v. Superior Court et al., 2d Civ 42966 and, as a record of that Court, were available for that Court's examination on the appeal below.7/

On September 11, 1973, plaintiffs filed with the Trial Court the declarations of Plaintiffs Raymond P. Gauer and Richard Walton in support of plaintiffs' motion for a preliminary injunction. (See Petition for Writ of Mandate in Harmer et al. v. Superior Court et al., 2d Civ 42966

7/ See Petition for Writ of Mandate in 2d Civ 42966 at para. V, p. 5, lines 13-21.

at p. 5).

On September 12, 1973, the cause came on for a hearing in Department 85 of the Los Angeles Superior Court before the Honorable David A. Thomas and arguments were had thereon. At the conclusion of said arguments, Judge Thomas issued his ruling from the bench in which he sustained the defendants' demurrer without leave to amend as to all five causes of action and placed the motion for a preliminary injunction off calendar. (R.T., of proceedings on September 12, 1973).

In sustaining the demurrer to the first cause of action, brought under Civil Code Sections 3479, 3480 and 3493 to enforce the right of a private citizen to abate a public nuisance on a showing of special injury to the plaintiffs, Judge Thomas ruled that, under Harmer vs. Tonylyn Productions, 23 Cal.App. 3d 941, decided by the Court of Appeal, Second District, Division 2, on March 2, 1972, an obscene film "shown only in a closed theater to those persons who pay the admission price and who have entered the theater does not constitute a public nuisance" under California law; that therefore an action by a private citizen to abate a "public nuisance" would not lie under the facts pleaded; and that the allegations of special injury alleged at

paragraph 33 on page 20 of the first cause of action were irrelevant and would not be considered by the Court.

In sustaining the demurrer to the second, third, fourth and fifth causes of action brought under Penal Code Section 11225, et seq., known as the Red Light Abatement Act a.k.a. Abatement of Unlawful Activities, Judge David A. Thomas ruled as follows: that "for the purpose of the demurrers, at least, the Court concludes that without doubt this is an obscene film, but Harmer v. Tonylyn Productions makes it very clear that the so-called Red Light Abatement Act does not apply to motion pictures. . ."; that "Constitutionally, clearly the act could apply to the showing of film. Paris Adult Theater No. 1 vs. Slaton, decided by our United States Supreme Court on June 21, 1973, reported at 13 Criminal Law 3171, makes it very clear that there would be nothing constitutionally prohibitive about simply applying our Red Light Abatement Act to films in a closed theater;" that "This Court can't find any qualifications in the act itself against applying it to film, and recalls the incredulous attitude of Justice Gardner in the Sarong Gals case (People of the State of California ex rel. Hicks v. Sarong Gals, 27 Cal.App. 3d 46, 103 Cal.Rptr. 414, decided

by the Fourth District, Division 2 on August 3, 1972) concerning this limitation. . . ."; that "If this were a matter of — if this were an original proposition before this Court, it would probably construe that Penal Code Section 11225 to include lewd films as well as lewd live acts"; that while Santa Clara County Superior Court Judge Bruno had applied the Red Light Abatement Act to the motion picture film "Deep Throat" in a decision filed on July 3, 1973, in People of the State of California v. Pussycat Theater, Inc., et al., No. 290747, the Court "cannot conclude that it is free, as has been done in other jurisdictions this Court recognizes, to simply disregard that Appellate decision (Harmer v. Tonylyn Productions, Inc.) but feels that it is bound by it" and that under Auto Equity Sales v. Superior Court, 57 Cal.2d 450 "the Superior Court cannot refuse to follow the decision of a higher court regardless of the personal feeling of the particular judge sitting in the Superior Court."

Superior Court Judge David A. Thomas' order of dismissal was filed in the trial court on September 13, 1973, pursuant to that court's oral ruling from the bench on September 12, 1973, sustaining the demurrer to Plaintiffs'

Complaint without leave to amend. (C.T. at p. 267 and R.T. of Oral Ruling on September 12, 1973).

A petition for writ of mandate entitled John Harmer, et al. v. Superior Court of the State of California for the County of Los Angeles, 2d Civ. No. 42966, was filed with the Court of Appeal, Second Appellate District on September 27, 1973, and was denied without opinion on October 4, 1973. A Petition for Hearing on Denial of Petition for Writ of Mandate was filed in the Supreme Court on October 12, 1973. On November 1, 1973 the California Supreme Court entered an order extending the time for granting or denying a hearing to and including December 3, 1973, and on November 21, 1973, such petition for hearing was denied with Justices Burke and Clark dissenting.

Petitioners herein filed a Notice of Appeal and Notice To Prepare the Clerk's Transcript on September 19, 1973 and the record on appeal was filed on February 25, 1974. Appellants' Opening Brief was filed on March 27, 1974 and Respondents' Brief was filed on or about May 13, 1974. On May 23, 1974 Petitioners filed an Application for Preference on Setting of Hearing Date for Oral Argument, and the same was denied on June 6, 1974.

On December 27, 1974, the Court of Appeal, Second District, Division 3 filed its decision in Joseph Busch et al. v. Projection Room Theater et al., 44 Cal.App. 3d 111, 118 Cal.Rptr. 428 holding, contrary to the law stated in Harmer et al. v. Tonylyn Productions, Inc., supra, that the continuous exhibition in a theater of obscene motion pictures can constitute a public nuisance as an activity which is "indecent or offensive to the senses. . . so as to interfere with the comfortable enjoyment of life or property" and which "affects at the same time an entire community or neighborhood, or any considerable number of persons. . .".

On December 31, 1974, Division 3 ordered this appeal on calendar for oral argument and the same were held on January 21, 1975. On January 31, 1975, Division 3 filed its opinion affirming the trial court's judgment, which had sustained the general demurrer to the causes of action, but reversing the judgment of dismissal and remanding the cause to the trial court with instructions to grant plaintiffs a reasonable time within which to file an amended complaint to show "special injury sufficient to justify the maintenance of a private suit to abate a public nuisance", or "a controversy with a potential

for substantial injury justifying their maintenance of a declaratory relief action".

Petitioners herein filed a Petition for Rehearing on February 14, 1975, and the same was denied on February 20, 1975.

On March 11, 1975, Petitioners filed a Petition for Hearing in the California Supreme Court and the same was granted on March 26, 1975.

On June 1, 1976, the California Supreme Court filed its opinions in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal. 3d 42, 130 Cal.Rptr. 328 (June 1, 1976) and such decision became final on or about August 1, 1976. On August 9, 1976 the California Supreme Court retransferred the case back to the Court of Appeal, Second District, Division Three for reconsideration in light of Busch, supra.

On September 17, 1976, Division 3 filed a new opinion which encorporated substantially all of the law stated in its previous opinion, filed on January 31, 1975. A copy of Division 3's opinion, filed September 17, 1976, is attached to this Petition at Appendix "A".

On October 27, 1976, petitioners filed a Petition for Hearing in the California Supreme Court and on November 12, 1976, the California Supreme Court entered an order denying the petition without opinion.

The Related "Deep Throat" Case[8/]

Petitioners John Harmer and Raymond P. Gauer herein, were also appellants with Salvatore Maiorino on an appeal from an adverse ruling in an identical civil abatement action seeking to abate the film "Deep Throat" and the theater at which it was exhibited in a case entitled John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Film Entitled "Deep Throat" et al., 2d Civ 43913. Salvatore Maiorino's residence was within 350 feet of the theater where "Deep Throat" was being exhibited. In the "Deep Throat" appeal, the Court of Appeal, Second Appellate District, Division 1 filed its opinion on March 27, 1975 affirming the trial court's orders, which had sustained the general demurrer to the second cause of action of Plaintiffs Harmer, Gauer and Maiorino (based upon the Red Light Abatement Law) and to the first cause of action of Plaintiffs Harmer and Gauer (based

8/ A similar petition for writ of certiorari is being prepared for filing with the Clerk of this Court in a companion appeal in John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Film Entitled "Deep Throat" et al., 2d Civ 43913 involving the sustaining of a demurrer and the denial of a preliminary injunction after a hearing thereon.

upon the right of a private citizen to enjoin and abate a public nuisance under Civil Code Sections 3480 and 3493) and had denied Plaintiffs' motion for a preliminary injunction under both causes of action, including Maiorino's motion for a preliminary injunction under his first cause of action on the singular ground that Maiorino's first cause of action failed to state a claim as to which a preliminary injunction could be granted. On May 5, 1975, petitioners Harmer, Gauer and Maiorino filed a Petition for Hearing in the California Supreme Court in the "Deep Throat" case, supra, and on May 22, 1975 that Court granted a hearing in such matter.

On June 1, 1976, the California Supreme Court filed its opinions in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal. 3d 42, 130 Cal.Rptr. 328 (June 1, 1976) and such decision became final on or about August 1, 1976. On August 12, 1976 the California Supreme Court retransferred the "Deep Throat" appeal back to the Court of Appeal, Second District, Division One for reconsideration in light of Busch, supra.

On October 8, 1976, petitioners in the "Deep Throat" appeal were informed by telephone by the Clerk of the Court of Appeal (Division One) that

a supplementary brief would be received by the Court, and that such was to be filed on or before October 25, 1976. On October 25, 1976, petitioners filed and served Appellants' Supplementary Brief in the "Deep Throat" appeal.

On November 23, 1976, the Court of Appeal (Division One) heard reargument in the "Deep Throat" case, and on December 10, filed its opinion affirming the orders of the Trial Court. A copy of the "Deep Throat" opinion is attached to this Petition at Appendix "B".

On December 20, 1976, petitioners in the "Deep Throat" appeal filed a Petition for Rehearing in the Court of Appeal. In the Petition for Rehearing at p. 3, petitioners asked the Court of Appeals to take judicial notice of (1) p. 65 of the Calendar Section of the Los Angeles Times newspaper containing the adult movie advertisement for Sunday, December 19, 1976, containing the Appellee Pussycat Theatre's advertisement for "Deep Throat" and broadcasting that it is "Now in its 5th year" and that the Appellees are expanding their operations to the San Fernando Valley and Riverside; (2) p. 54 of the Los Angeles Times Calendar Section containing the news report on the "Decline and Stabilization of the Adult Film", the full swing to hard-core, and statements

of the "surefire formula for what will work today", attributed to Appellee Miranda and (3) the fact that neither the District Attorney of Los Angeles County nor the City Attorney of the City of Los Angeles have made any effort to challenge those public nuisances in the Courtroom; and to grant a rehearing on the questions presented in the appeal.

On January 4, 1977, the petition for rehearing in the "Deep Throat" appeal was denied.

On January 19, 1977, petitioners filed a Petition for Hearing in the California Supreme Court in the "Deep Throat" case and in that Petition, asked that court to resolve the conflict which appeared in the two unreported decisions. On February 3, 1977, the California Supreme Court entered an order denying the Petition for Hearing in "Deep Throat" without opinion.

REASONS FOR GRANTING OF THE WRIT

POINT I

THE FAILURE OF THE STATE OF CALIFORNIA TO PROVIDE A PROMPT JUDICIAL FORUM IN WHICH TO RESOLVE THE "HARD-CORE PORNOGRAPHY VS. FREE SPEECH" ISSUE RE THE FILM "DEVIL IN MISS JONES" RAISES A SUBSTANTIAL FEDERAL QUESTION.

In the 18 terms of Court since Roth-Alberts, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), was decided in June of 1957, the dockets and decisions of this Court have chronicled a major governmental struggle over the public morals of this nation (as they relate to human sexuality), between the constitutional powers of the government as a whole (State) and the people, embodied in the Tenth Amendment (Police Power), and the countervailing rights of the individual set forth in the First Amendment. In the pattern which has evolved from those decisions, this Court has fashioned a procedural requirement to maintain the balance. As recently as the 1974 October Term, Justice Blackmun, writing the majority opinion for five justices,

in Southeastern Productions Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (March 18, 1975) ruled that minimal procedural safeguards had not been provided to the individual, in a case where government (the City of Chattanooga) sought to deny the use of a municipal auditorium for presentation of the theatrical production "Hair". See also: Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); United States v. Thirty-Seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 27 L.Ed. 2d 498, 91 S.Ct. 423 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S. Ct. 754 (1968). The central theme in all of these decisions has been, as stated by Justice Blackmun in Southeastern Productions Ltd., supra, at p. 460, that:

> "a prompt final judicial determination must be assured".

It would seem self-evident that "prior restraint" and "free speech" are not the exclusive province of the individual, but are shared equally with the community as a whole and the people as individuals, for it is only through the judicial system that the community itself or individuals can "speak" collectively, so as

to reject that which is offensive to "public morality". While the procedural requirement of a "prompt judicial determination", referred to above, has always been discussed in the framework of "prior restraint" and the "First Amendment" rights of the individual to free speech in the marketplace of ideas, there is no reason to believe such procedural requirement does not, for the very same reason, also bind the state system where, as here, the same claim is being presented by individuals residing within a community under a claim that the subject matter is hard-core pornography, as a matter of law, which is offensive to the community in which they reside and affects them personally as members of that community.

The petition herein asserts that procedural requirement as a federal right - the right to an immediate hearing and determination.[9/] Where such

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9/ Petitioners claim a civil right as individuals, to live in an environment which is free from the corrupting influences of hard-core pornography. The judicial system in California, by its refusal to provide a prompt forum for the issues herein presented, has effectively imposed a "prior restraint" on the Community's right to "speak out" in this regard, and the right of individual members, close enough to the public nuisance to be affected, to "speak out" when the Community's law enforcement officials fail and neglect to do

federal procedural safeguards do not exist by statute, the State Court is required to fashion the same through judicial construction and interpretation. See People ex rel. Busch, etc., et al. v. Projection Room Theater, et al., 17 Cal. 3d 42, 130 Cal.Rptr. 328 at 338.

Petitioners contend that the action of the Trial Court sustaining the demurrer and precluding immediate relief on petitioners' application for extraordinary relief and a prompt judicial forum to determine the "Hard-core pornography vs. Free Speech" issue re the film "Devil In Miss Jones" Raises a Substantial Federal Question in that the evidence which the petitioners offered in support of their motion, and which was uncontroverted, showed: (1) that under Near, supra, properly interpreted, "free speech" was not a relevant issue, and (2) the existence of a nuisance per se. Reasonable minds would not differ

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so. See the opinion of the Montana Supreme Court in U.S. Manufacturing and Distributing Corp. v. City of Great Falls, 546 P.2d 522 at p. 526 (February 25, 1976), which suggests that a local community has an inherent right to halt the type of conduct specifically pleaded in the Complaint below. Is the right to an immediate hearing a one-way street? Is the right of an individual to speak out against hard-core pornography of a lesser order than the right to speak out for it (by exhibiting the same)?

and all would hold that such evidence showed the film "Devil In Miss Jones" to be "obscene per se" and a public nuisance as a matter of law.

POINT II

THE "SPECIAL INJURY" CONCEPT SERVES NO VALID PURPOSE IN THE PRESENT STRUCTURE OF THE LAW, AND SHOULD NO LONGER BE A VIABLE EXPEDIENT IN THE DISPOSITION OF PUBLIC NUISANCE ABATEMENT CASES WHERE THERE IS PRESENT IN A BONA FIDE ADVERSARIAL DISPUTE. CERTAINLY, IT HAS NO APPLICATION WHERE THE PLAINTIFFS' ATTACK IS BASED UPON CONSTITUTIONAL GROUNDS.

The opinion of Division Three in the cause herein ("Devil In Miss Jones") is irreconcilable with the opinion of Division One in the "Deep Throat" appeal. (See Appendix "A" and "B" herein.) If petitioners attempt to meet the requirements of Division 3 in the trial court below, they may be thrown out of Court hereafter, on the rationale employed by Division 1 in the Deep Throat case, supra. These inconsistent results present a due process and unequal protection of the law dilemma in the resolution of this "special

injury" issue. To further complicate matters, both decisions are unreported and, as such, are subject to the prohibition of Rule 977 of the California Rules of Court, which prevents their citation as precedent, a result which violates time-honored "stare decisis" principles.

Petitioners submit that the opinion of the Court of Appeal (Division 3) in Harmer et al. v. A Motion Picture Film Entitled "Devil In Miss Jones" herein, recognizes the fact that strict application of the "special injury" concept in such a case as this poses a problem and may not be in the best public interest. That Court remanded the cause to the trial court for amendment "to show special injury sufficient to justify the maintenance of a private suit to abate a public nuisance or a controversy with a potential for substantial injury to them justifying their maintenance of a declaratory relief action." (See Appendix "A" at pp.15-16.) On the other hand, Division 1, in Harmer et al. v. A Motion Picture Film Entitled "Deep Throat" et al., supra, avoided that approach and, giving lip service to the problem, suggested that if the "special injury" requirement were to be recognized as having been met, that it was a matter for the California Supreme Court to consider. (See Appendix

"B" at pp.11-14.) Faced with this "special injury" standing requirement and dilemma in public nuisance abatement cases brought by private citizens, the California Supreme Court did nothing!

In Save Sand Key, Inc. v. U. S. Steel Corp., 281 So.2d 572 at 574, the District Court of Appeal of Florida, Second District, in addressing itself to the "special injury" standing requirement in public nuisance abatement cases brought by private citizens stated:

> "(I)t is anathema to any system of justice to proclaim that a right may be enjoyed by all yet none may protect it. Accordingly, except in strictly nuisance cases to date, the obvious recent trend is to open the courts to afford relief to many more parties plaintiff than were heretofore entitled thereto under the 'special injury' rule so broadly applied."

In striking that requirement from the law of public nuisance, the Court took note of the end result which, more often than not, flowed from an adherence to that rule of law:

> "(A)ll too often we observe the aforesaid duty to abate nuisances rested overly long in the bosom of the appointed officials

> and relief was indeed ultimately never attained by the public or anyone else."

While the District Court of Appeal decision, above referred to, was subsequently reversed by the Florida Supreme Court by a 4-3 vote in U.S. Steel Corp. v. Save Sand Key Inc., 303 So.2d 9 (June 12, 1974), the analysis of those justices who voted for abandoning that test bears recognition, for it points up the injustices which are being perpetuated by a rigid interpretation of the "special injury" requirement.[10/]

While the majority of the Florida Supreme Court did not uphold the decision of the lower Florida appellate court which struck the "special injury" requirement from the law, that Court did reaffirm an exception previously adopted in Department of Administration v. Horne, 269 So.2d 659 (1972), "limited to constitutional challenges on taxing and spending as earlier indicated." In that case, the Florida Supreme Court stated:

10/ In his dissent at p. 14, Justice Ervin of the Florida Supreme Court recommends for reading the case comment in University of Florida Law Review Vol. XXVI No. 2, Winter 1974, p. 360 which analyzes the Sand Key, Inc., case, and at p. 365 reports on the final disposition in such cases where there is no one left to enforce the public right.

> "Appellees have alleged the unconstitutionality of certain sections of an appropriations act. These sections are said to be violative of constitutional provisions which place limitations upon enacting legislation regarding state funds. We hold that such allegation in this narrow area satisfied the requirement for 'standing' to attack an appropriations act."

The decision of the Florida Supreme Court in Horne, supra, was based upon the rationale expressed by this Court in Flast v. Cohen, 392 U. S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (June 10, 1968). Flast presented the first evidence of a reevaluation of the special injury rule and its effect on the standing question. In that taxpayer suit challenging federal spending, the Court recognized standing without requiring a showing of special injury. This Court indicated that standing was merely a threshhold question determining whether the dispute sought to be adjudicated would be presented in an adversary context. With this emphasis on the adversary context, the standing criterion approached "injury-in-fact", "aesthetic, conservational, and recreational as well as economic." The Court expressly dismissed the long espoused spectre of multiplicity of actions, recognizing the ability of

the courts to exercise judicial discretion in order to avert completely frivolous lawsuits.

The recent federal actions defining and expanding injury-in-fact were based on judicial interpretation of statutory authority giving "persons aggrieved" standing to challenge agency action. This concept was expanded in Sierra Club v. Morton, 405 U.S. 727, 732 (1972), holding that where a party does not rely on statutory authorization the question of standing depends on whether the party has alleged such a personal stake in the outcome that the dispute will be presented in an adversary context.

Petitioners submit that the nature of the case -- being a conflict between alleged first and tenth amendment rights — places the instant controversy in that category of exceptions governed by Horne which call for an acknowledgment of the "standing" rule applied in Flast v. Cohen, supra, and Sierra Club v. Morton, [11]

11/ See University of Florida Law Review Vol. XXVI No. 2, Winter 1974, p. 360 at p. 366: "The public has demonstrated an ability to present the essential issues with sufficient clarity to insure the requisite adversary context. The instant decision recognizes the judiciary's ability to utilize modern rules of procedure and pleading to insure that the proper parties and issues are before it. By refusing to apply inflexible and outdated standards that prevent, rather than

supra, rather than the "special injury" rule formerly adhered to. The Flast and Sierra Club criteria are fully satisfied by petitioners herein. In few areas of the law is there a greater need for citizen participation in the Courtroom in the resolution of problems than in the legal attack against the growth of pornography in the local neighborhoods.

POINT III

THE DENIAL OF A PROMPT JUDICIAL FORUM IN WHICH TO CONTEST RESPONDENTS' RIGHT TO COMMERCIALLY EXHIBIT THE HARD-CORE FILM WHICH IS SPECIALLY PLEADED IN THE COMPLAINT HEREIN, HAS DEPRIVED PETITIONERS OF FUNDAMENTAL RIGHTS UNDER THE FEDERAL CONSTITUTION.

Petitioners as citizens of the U.S. have a federally protected right to live in a community whose public morals, moral values, and environment are free from the degrading and corrupting

promote, an efficient administration of justice, the instant court has demonstrated Florida's expanding judicial desire to allow citizen participation in the resolution of problems that directly affect them, whether individually or in common with the community."

influences of the patently hard-core pornography which is specially pleaded in the Complaint. The refusal, in 1973, to provide a prompt judicial forum and grant the immediate relief herein requested has deprived petitioners as citizens of the United States of:

(1) due process of law and equal protection of the law;

(2) the police power which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

A. Where Commercial Vice Is Involved, The Power To Abate The Same Is Inherent, And Plenary, And May Not Be Interfered With.

"The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of the Government." Mugler v. Kansas, 123 U.S.

205 at 210 (Dec. 5, 1887).

A legislative act or judicial ruling which would restrict a municipality's police power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210, 211. See also Stone v. Mississippi, 101 U.S. 816, where the United States Supreme Court noted:

> "no legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants . . . government is organized with a view to their preservation, and cannot divest itself of the power to provide for them."

The power to abate a Public Nuisance is one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se."

See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pp. 45-46:

> "Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public

decency."

"Section 24. Wrongs malum in se. -- This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at p. 972:

"Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no

question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

See also, Section 3495 of the California Civil Code, at Appendix "F" infra. Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at p. 498:

"The rule is declared to be settled, without

dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this abatement power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. . ."

"It is a principle of the common law, that the king cannot sanction a nuisance. . ."

B. The California Judiciary Have A Moral Responsibility As The Guardian Of The Peoples' Morals.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardian of the public morals. Rex v. Curl, 2 Strange 789 (1727), Sir Charles Sedley's Case, 1 SID 168. Where the legislature had bargained away that power, the California Court in Farmer v. Behmer, 100 P. 901 at 904 had the following to say:

"It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for a moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute . . . ."

Since the legislatures are subject to censure by the California Courts for failing in their responsibility to safeguard the public morals, then the Courts should also be expected to reciprocate and exercise those powers and perform those duties which are required of the Court under the common law in similar circumstances. See Stone v. Mississippi, supra.

POINT IV

THE FILM "THE DEVIL IN MISS JONES" IS OBSCENE AS A MATTER OF LAW.

In the complaint on file below, Appellants have pleaded factual obscenity specially, and by attaching an accurate time and motion study and continuity of the film "Devil In Miss Jones" to the complaint as exhibits and making the same a part thereof by reference. See Exhibits "A" and "B" to the complaint. See also the explicit sexual conduct alleged in the complaint at pp. 16-18 (C.T. 16-18). Such matters were pleaded specially so that an issue of law as to the sufficiency of the accusatory pleading might be placed before the trial court, which could be tested by the Defendants' demurrer. Ratner v.

Municipal Court of Los Angeles Judicial District, County of Los Angeles, 256 C.A.2d 925, 64 Cal. Rptr. 500, 502, 503 (Dec. 14, 1967). The time and motion study of "Devil In Miss Jones" consists of a chronological series of photographs timed in their relative order of appearance, depicting fairly and accurately the sexual conduct visually portrayed on the motion picture screen by such film. The "continuity" of "Devil In Miss Jones" which is incorporated into the complaint is an accurate reproduction of the sound portion of the subject film, identifying the actors, their roles and what they say as the film progresses. Visual screen depictions are recorded by still camera photographs reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of time. Such pleadings establish "The Devil In Miss Jones" to be a film which is obscene per se. Reasonable minds would not differ and could come to but one conclusion, i.e., that the film was hard-core pornography.

POINT V

UNDER THE FACTS PLEADED IN THEIR COMPLAINT, PETITIONERS HAVE DEMONSTRATED A CLEAR RIGHT TO EXTRAORDINARY RELIEF. THE HEARING ON THE APPLICATION FOR A PRELIMINARY INJUNCTION SHOULD HAVE GONE FORWARD AS NOTICED AND IMMEDIATE RELIEF SHOULD HAVE BEEN GRANTED.

The preliminary injunction issue, involving the film "Deep Throat" was before the Georgia Supreme Court in S.S.W. Corp. et al. v. Slaton, 204 S.E.2d 155 (Feb. 18, 1974). There, the Georgia Supreme Court held at p. 158:

> "We acknowledge that interlocutory judicial restraint with respect to a First Amendment claim must be reasonable and should be followed as promptly as is practicable by a final judicial determination of First Amendment issues. We tried to say this as plainly as we knew how in this court's order of October 1, 1973, denying the motion for supersedeas in this case (see appendix.)
>
> "But for this court to hold that a film, judicially determined to be obscene

> at a preliminary hearing, cannot be suppressed during the pendency of the litigation as to whether it is obscene or not would effectively deny the state the right to suppress the showing of an obscene film. This is so because without the possibility of interlocutory prohibition, a film, ultimately adjudged to be obscene, could be shown during the many months and years of trial and appellate litigation permitted by our system before a judgment is absolutely final.
>
> "Obscenity is not protected by the First Amendment, and after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment. In short, we hold that interlocutory judicial restraint of obscene material, with adequate provision being made that First Amendment claims can proceed to final judgment at the earliest practicable date, is not violative of First Amendment rights."

A. Respondents Should Be Held Responsible To The Community For An Accounting As To Their Unjust Enrichment Arising Out Of An Unlawful Act.

The subject matter which was pleaded in the body and Exhibits "A" and "B" to the Complaint, demonstrated beyond all shadow of a doubt that "The Devil In Miss Jones" is hard-core pornography under federal law and, as such, contraband; that the exhibition should have been terminated, and that the injunction should have been granted. Under rudimentary, equitable principles, respondents are required to account to the community for the unjust enrichment accruing by virtue of their unlawful act. People of the State of California v. Superior Court, 28 Cal.App.3d 600, 104 Cal.Rptr. 876, 882-885. See also, Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974). Appeal dismissed for want of a substantial federal question in Art Theater Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975) where the Ohio Supreme Court held at p. 918:

> "However, the Court of Appeals did not order a forfeiture; it merely required that appellants account for and pay to the county

> treasurer the receipts obtained from showing 'Without A Stitch' after the date on which the trial court's permanent injunction would have become effective had the judge not stayed it. This accounting was not imposed as a result of any illegal act on the part of appellants; it was, instead, a recognition by the Court of Appeals that the trial court erred when it stayed the effectiveness of its injunction order. As noted in our discussion under issue No. III, a trial court is required by R.C. 3767.05 to issue a permanent injunction when it declares a film to be obscene; it does not have the power to stay the effectiveness of the injunction. The only way the Court of Appeals could rectify that error was to assure that appellants did not profit thereby -- which was the object of the accounting order." (Our emphasis.)

CONCLUSION

Petitioners submit that the facts specifically pleaded in the Complaint clearly established the film "Devil In Miss Jones" to be hard-core pornography and the petitioners to be entitled

to immediate relief by way of a preliminary injunction against its exhibition. By denying a prompt judicial forum in which to contest the right of the respondents to publicly exhibit the same for profit, the State of California has deprived the petitioners of their federal civil rights to enjoy "common decency" and to live in a community whose public morals are free from the corrupting influences of patently hard-core pornography.

Further, it is a denial of due process of law to now require petitioners, more than three years later, to amend their pleadings before the judicial system will again consider the merits of the relief requested, where another Division of the same Appellate Court has ruled, in a companion case involving identical pleadings, that such pleadings cannot be amended to state a cause of action, and where the California Supreme Court has refused to resolve that patent ambiguity.

The Writ of Certiorari should be granted as prayed for.

DATED: February 8, 1977.

Respectfully submitted,

James J. Clancy
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 1977, copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN HARMER, RAYMOND P. GAUER, RICHARD WALTON, Plaintiffs and Appellants, v. A MOTION PICTURE FILM ENTITLED "THE DEVIL IN MISS JONES," et al., Defendants and Respondents.	2d Civil No. 43778 (Sup. Ct. No. C 63815)

APPEAL from a judgment of the Superior Court of Los Angeles County. David A. Thomas, Judge. Reversed.

James J. Clancy, for Plaintiffs and Appellants.

Miller, Glassman & Browning, Inc., and Anthony Michael Glassman; and Willard M. Reisz, for Defendants and Respondents.

Plaintiffs appeal from a judgment of dismissal after defendants' general demurrer was sustained without leave to amend. The complaint contains five causes of action and the sole ground of demurrer to each cause of action was failure to state sufficient facts to constitute a cause of action. As its title and prayer indicate, the complaint seeks to maintain a private suit in equity to abate public nuisances and a

declaratory judgment action. It is 73 pages in length (increased to 123 pages by exhibits) and it seeks relief against (1) a motion picture entitled "The Devil In Miss Jones," (2) a variety of persons who allegedly produced and released it for exhibition in the County of Los Angeles, (3) the operators of four so-called "adult" theatres currently and continuously exhibiting the film, and (4) persons having interests in the real property upon which the said theatres are located.

The first cause of action is directed at the motion picture itself and seeks to abate it as a public nuisance and to obtain a declaratory judgment that it is obscene matter. The motion picture is described in the complaint, in time and motion studies and in a continuity attached thereto, in a manner which (assuming such descriptions are accurate, as the demurrer admits) establishes that it is hard-core pornography and is obscene.

The second through fifth causes of action, respectively, are directed against each of the four theatres allegedly advertising and publicly exhibiting the subject film. They ask for the abatement of the theatres being so conducted as public nuisances under the general nuisance law (Civ. Code, §§ 3479, 3480)

and pursuant to the provisions of the Red Light Abatement Law (Pen. Code, §§ 11225-11235), as well as for declaratory relief as to the status of the property and the obscenity of the film.

The exhibition of the motion picture at each of these theatres is alleged to have been going on continuously for a period of several weeks during which the operators consistently advertised the theatres as purveyors of the "Tops in First Run Adult Entertainment, Always."

To support the standing of the various plaintiffs to maintain a private suit to abate the film itself and the four theatres' exhibition thereof as a public nuisance, the complaint alleges that plaintiff Harmer is a State Senator representing a legislative district in Los Angeles County and that he resides in such county and "in near proximity" to each of the four theatres exhibiting the film. The locations of the theatres are set forth: (1) on La Cienega Boulevard in Hollywood, (2) on Hollywood Boulevard in Hollywood, (3) on Wilshire Boulevard in Santa Monica, and (4) on Ventura Boulevard in Tarzana, all within the County of Los Angeles. The remaining plaintiffs are similarly alleged to be "residing in near proximity" to the said four theatres. In addition, in paragraphs 32 and 33 of the complaint, plaintiffs allege the

conclusion that "the near proximity of such public nuisances to (their) residences, places of business, and play areas of their minor children establishes the same as a private nuisance as to each of the Plaintiffs and their minor children." Further "(s)pecial injury and damages" are alleged consisting of plaintiffs being offended, outraged, shamed and embarrassed by the daily exhibition and advertisement of pornography in their community and being "subjected to the direct and indirect consequences" of such activity including the attraction of criminal elements, decrease in value of real property, erosion of public morality, higher probability of sexual promiscuity and venereal disease, divorce and illegitimate births among members of the community, and the attraction of similar unsavory and unwholesome businesses thereto.

In addition, with respect to causes of action two through five, plaintiffs base their standing to sue upon the provisions of Penal Code section 11226, authorizing any citizen residing within the county to sue for the abatement of a "place used for the purpose of . . . lewdness."

The trial court sustained the general demurrer to each of the five causes of action

on the authority of Harmer v. Tonylyn Productions, Inc., 23 Cal.App. 3d 941, which it construed as foreclosing plaintiffs from showing that the continuous exhibition of a motion picture film, however obscene, in a closed theatre to which only consenting adults were admitted either (1) was a public nuisance under sections 3479 and 3480 of the Civil Code, or (2) made the theatre in which such exhibition occurred a "place used for the purpose of . . . lewdness, assignation, or prostitution," under Penal Code section 11225. For this reason the court did not pass upon the sufficiency of the allegations of paragraphs 32 and 33 of the complaint to show plaintiffs' standing to maintain a private suit to abate a public nuisance as persons specially injured.[1/]

Plaintiffs contend in a 127-page brief that Harmer v. Tonylyn, supra, should be overruled or distinguished and that they have alleged

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1/ The Court said in this respect:

" . . . This paragraph 33 becomes significant only if we first decide that the matter is -- I first decide that the showing is a public nuisance, after which we would go to the second issue of determining whether the particular defendant (sic) can show that special injury which allows him to abate privately a public nuisance; but because we never get beyond the first issue, the pleadings in paragraph 33 are irrelevant.

facts upon which both the motion picture "The Devil In Miss Jones" and the theatres exhibiting it may be found to be public nuisances subject to abatement by their suit as persons specially injured. Respondents are content to rely upon the Harmer case and have filed a single six-page brief asserting its applicability and continued vitality. The basic issue presented by this appeal is, therefore, the effect of the decision in Harmer upon plaintiffs' claim that the motion picture and the exhibition of it in defendants' theatres constitute a public nuisance under the provisions of sections 3479 and 3480 of the Civil Code and section 370 of the Penal Code, and upon plaintiffs' contention that the exhibition of the said picture in defendants' theatres makes them places "used for the purpose of . . . lewdness, assignation, or prostitution," under section 11225 et seq. of the Penal Code.

The first such question has already been disposed of by our Supreme Court in People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42. In Busch, the court held that complaints containing allegations that the defendant adult theatres were exhibiting on a continuous basis obscene motion pictures, which allegedly constituted public nuisances,

brought by the District Attorney and City Attorney, were sufficient to survive general demurrers for failure to state causes of action. For reasons more fully stated in the opinion in that matter, our Supreme Court disapproved Harmer in this respect, stating "there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes." (17 Cal. 3d at p.55.) There is no need in this unpublished opinion to repeat what was said in Busch. It is sufficient to state that, as applied to this case, that decision compels the conclusion that the allegations of the complaint herein are sufficient to describe activity constituting a public nuisance. Consequently, the basis upon which the trial court sustained the demurrers without leave to amend did not justify that ruling.

The decision in Busch, however, establishes merely that a public nuisance is sufficiently alleged. The plaintiffs in that case were the District Attorney and City Attorney and, as such, were authorized to bring actions to abate public nuisances. The plaintiffs in this case, however, have no such status, and in order to state a cause of action to abate a public nuisance, they are required to show that they are

persons who are specially injured:

> "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, § 3493.)[2/]

In the instant case, plaintiffs' allegations of purported special injury, above described, are also inadequate to meet the requirements for the maintenance of a private suit to enjoin a public nuisance. By claiming that all of the plaintiffs reside in "near proximity" to all four theatres, the locations of which are alleged to be separated by as much as 15 miles, plaintiffs reveal that the character of their injury by reason of "proximity" is no different than that suffered by the population of Los Angeles County in general. The other allegations of outrage, embarrassment and shame, the consequences of the attraction of undesirables, general decrease in values, erosion of morality, and the attraction of other immoral activities also clearly describe injury no different in character than that suffered by the general public.

2/ In Busch, Harmer was not disapproved insofar as it held that "plaintiff (private citizens) had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) this casting doubt upon his status as a litigant." (17 Cal. 3d at p. 52.)

Such injury is not special injury justifying departure from the policy of this state which leaves the enforcement of the nuisance law in the hands of the public prosecutor in the local community. A recent statement of this policy is contained in Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App. 3d 116. In that case a plaintiff claiming special injury from air pollution, by virtue of his preexisting allergies and respiratory disorders, was held not to have standing to sue. The court said (at pp. 123-124):

> "The remedies against a public nuisance, i.e., the redress for the wrong to the community, are by indictment or information, a civil action, or abatement. (Civ. Code, § 3491.) Adverting specifically to the remedy by way of a civil action, since this is the remedy with which we are here concerned, we apprehend the law of this state to be that such action is ordinarily properly left to the appointed representative of the community and may be maintained by a private person only if the public nuisance is specially injurious to him. (Civ. Code § 3493; see Code Civ. Proc., § 731; and see Prosser on Torts (3d ed.) at p. 608.) Section 3493 of the Civil Code specifically provides that 'A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.' (Italics added.) The genesis of this rule is found in the common law which recognized that 'the action would lie if the plaintiff could show that he had suffered special

damage over and above the ordinary damage caused to the public at large by the nuisance.' (Prosser on Torts (3d ed.) at p. 608.)

"In applying the rule articulated in section 3493 to a particular case, cognizance must be taken as to whether the public nuisance alleged is also a private nuisance, since this factor is important in determining how the statute is to be applied. The difference becomes important in view of the fundamental principle that a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser (sic) on Torts (3d ed.) at p. 594.)

"Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public. (Ward v. Oakley Co., 125 Cal.App. 2d 840, 850 (271 P.2d 536); Donahue v. Stockton Gas etc. Co., 6 Cal.App. 276,279, 280 (92 P. 196); Wallace v. MacDonough Theater Co., 34 Cal.App. 498, 499 (168 P. 144); Voorheis v. Tidewater Southern Ry. Co., 41 Cal.App. 315, 320 (182 P. 797); Hitch v. Scholle, 180 Cal. 467, 468-469 (181 P. 657); Frost v. City of Los Angeles, 181 Cal. 22, 24 (183 P. 342, 6 A.L.R. 463); Brown v. Rea, 150 Cal. 171, 174 (88 P. 713); Thompson v. Kraft Cheese Co., 210 Cal. 171, 178 (291 P. 204).) Under this

rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. (Voorheis v. Tidewater Southern Ry Co., supra; Brown v. Rea, supra; Donahue v. Stockton Gas etc. Co., supra; see Prosser on Torts (3d ed.) at pp. 608-609.)"

By contrast, Donahue v. Stockton Gas etc. Co., 6 Cal.App. 276, illustrates the kind of special injury which does justify a private action to abate a public nuisance. There an escaping gas, which polluted the atmosphere, thereby injuring the public in general, also poisoned the soil and the soil water on the plaintiff's adjoining parcel. Sustaining the plaintiff's standing to sue, the court said (at pp. 279-280):

"It is contended by respondent that the complaint discloses a public nuisance and that no clear case of special damages is shown so as to entitle plaintiff to maintain the action. The law is well settled that a private person, to have any standing in an action of this character, must show that he has suffered not only special injury but of a different kind from that of the public and not simply a difference in degree. (Civ. Code, secs. 3480, 3493; Jarvis v. Santa Clara Val. R. R. Co., 52 Cal. 438; Bigley v. Nunan, 53 Cal. 403; McCloskey v. Kreling, 76 Cal. 512, (18 Pac. 433); Siskiyou Lumber & Mercantile Co. v. Rostel, 121 Cal. 511, (53 Pac. 1118); Reynolds v. Presidio R. R. Co., 1 Cal.App. 229, (81 Pac. 1118).) But it is obvious from an

inspection of the complaint that this criticism applies to the pollution of the atmosphere and not to the injury done to the soil and the water. The former is suffered in common by a large part of the community, as expressly appears by the allegation; 'And the same corrupts, pollutes and poisons the entire atmosphere in that section of said city of Stockton.' The following qualification, 'and especially that portion that belongs to plaintiff and that by reason thereof the plaintiff's premises have been injured and depreciated in value' may indicate an injury different in degree from that of the public, but it is of no importance in the attempt to state the special damage required by the statute and the decisions. This is apparent from the cases already cited. Hence, if this were the only charge made against defendant it is clear that a general demurrer to the complaint would lie. But the other injury of which complaint is made is not shared by the public at all. This appears from the location of plaintiff's premises and also by explicit averment. That this portion of the complaint in reference to the pollution of the soil and water states a cause of action is clear from the authorities. It is charged in specific language that defendant negligently and carelessly constructed its works and has operated them in such an inefficient manner as to pollute the water on plaintiff's premises, and to injure and poison the soil so that it is rendered un-

unproductive and the particular loss occasioned is pointed out. In that regard plaintiff has stated every material fact necessary to constitute a cause of action."

See also Farmer v. Behmer, 9 Cal.App. 773, where the next door neighbor of a house of prostitution was held to be specially injured when she was obliged to listen to the loud profanity of its inmates, to view them indecently exposing themselves at the windows and to suffer the disturbance of drunken conduct of the customers at late hours.

As applied to a motion picture claimed to be a public nuisance, the same requirement is stated in Wallace v. MacDonough Theater Co., 34 Cal.App. 498. In that case persons who alleged that they found the film "Birth of a Nation" specially injurious because, as blacks, they were held up to "public ridicule and contumely" and subjected to the effects of "general race hatred between the white and negro races" were held not specially injured because they showed no "special injury to themselves aside from and independent of the general injury to the public."

The purported special injury alleged by plaintiffs is not "of a character different in kind from that suffered by the general public"; it does not establish their standing to

sue.

Plaintiffs' reliance upon the Red Light Abatement Law to establish their standing is likewise misplaced. Penal Code section 11226 does provide that "any citizen of the State resident within said county" may maintain an action to abate any nuisance coming within the provisions of section 11225. In People ex rel. Busch v. Projection Room Theater, supra, 17 Cal. 3d 42, 62, the court held that the provisions of the Red Light Abatement Law were not "intended to apply, and do not apply, to the exhibition of obscene magazines or films." This disposes of plaintiffs' contention.

There remains, however, one further basis upon which plaintiffs assert standing to have the questions of obscenity and public nuisance posed by the exhibition of "The Devil In Miss Jones" determined. All five causes of action seek declaratory relief declaring the motion picture obscene and not entitled to First Amendment protection.

Section 1060 of the Code of Civil Procedure provides that "in cases of actual controversy relating to the legal rights and duties of the respective parties" any person who desires a declaration of his rights or duties with respect to another may bring an

original action in the superior court for a declaration of his rights and duties. Two problems are posed by plaintiffs' reliance upon the declaratory judgment procedure. The first problem is that plaintiffs have not alleged the existence of a controversy. There is no allegation at any point in their complaint to the effect that defendants or any of them deny that the motion picture is obscene or deny that the exhibition of it is a public nuisance.

Moreover, even if a controversy were alleged, a question would exist as to plaintiffs' standing to maintain the action. In addition to stating a controversy, declaratory relief plaintiffs are required to allege facts showing some relationship to the controversy by virtue of which its solution will affect their substantial legal rights. Though it is true that in respect of matters of such general concern as the world's deteriorating environment the plaintiff need not have a direct property interest, facts must be alleged showing the existence of a greater or different interest than that of the members of the public in general In Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal.App. 3d 117, a nonprofit corporation whose members owned property in the area was held to have standing to maintain a declaratory relief

action testing the validity of an ordinance pursuant to which the city had granted a conditional use permit for development which allegedly would have caused an adverse effect upon the environment. Upholding the plaintiff's standing to sue, the court said:

> "In reaching our conclusions, we first note that environmental concerns underlie this action. Such matters are the proper subject of judicial consideration. '. . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' (Sierra Club v. Morton, 405 U.S. 727, 734 (31 L.Ed.2d 636, 643, 92 S.Ct. 1361).) Quoting this language, the California Supreme Court further referred to Sierra Club when it said, '. . . In dissenting Justice Blackmun decried rigidity of the law that prevented reaching issues involving significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances" (405 U.S. at p. 755 . . .).' (Italics supplied.) (Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 254 (104 Cal.Rptr. 761, 502 P.2d 606, 1049).) See also Associated Home Builders etc., Inc. v. City of Walnut Creek, 4 Cal. 3d 633 (94 Cal.Rptr. 630, 484 P. 2d 606, 43 A.L.R. 3d 847).

> "In recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue (Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276 (32 Cal.Rptr. 830, 384 P.2d 158)) and even of capacity to sue (Daniels v. Sanitarium Assn., Inc., 59 Cal. 2d 602 (30 Cal.Rptr. 828, 381 P.2d 652)) where matters relating to the 'social and economic realities of the present-day organization of society' (Daniels at p. 607) are concerned. Accordingly, we have seen a retreat from the formalism and rigidity referred to in Friends of Mammoth, supra. That process may be seen in several cases.
>
> "Thus, Parker v. Bowron, 40 Cal. 2d 344 (254 P. 2d 6), another case principally relied upon by defendants, held that a plaintiff who claimed to represent city employees in a suit concerning their wages, by reason of the plaintiff's position as secretary-treasurer of an unincorporated association of unions whose members were city employees, had no right or interest in the subject matter himself and could not represent the employees. Yet, in Professional Fire Fighters, supra, the court distinguished Parker on the technical ground that Parker involved an unincorporated association, saying '(b)ut here, we have no question of an unincorpoated association, and no basis for a claim that the class for whom the action was brought is without beneficial interest.' (60 Cal. 2d at P. 284)."

(34 Cal.App. 3d at pp. 122-123.)

In a comparable situation, however, plaintiffs who alleged merely that they were citizens and taxpayers of the State of California were held not to have any standing to sue in declaratory relief to obtain a declaration that the Department of Public Health had the duty and authority to act with respect to air pollution despite the enactment of the Mulford-Tarrell Air Resources Act granting broad powers in that field to the California Air Resources Board. The court said in Zetterberg v. State Dept. of Public Health, 43 Cal.App. 3d 657, 662:

> "Plaintiffs' allegation that they are taxpayers does nothing to establish their standing to seek the relief sought and their complaint fails to set forth any circumstances indicating that as citizens of the state they have any greater or different interest in the subject than any other member of the body politic."

The standard applicable to determining the standing of a plaintiff to maintain a declaratory relief action was stated in general terms in California Water & Telephone Co. v. County of Los Angeles, 253 Cal.App. 2d 16, 22-23:

> "One who invokes the judicial process does not have 'standing' if he, or those

> whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented."[10]

"10/ E.g., Jennings v. Strathmore Public Utility Dist. (1951) 102 Cal.App. 2d 548 (227 P. 2d 838) (plaintiff had no standing to challenge validity of contracts for construction of sewage system where his only interest was as a citizen and a potential worker on the project). See also Note, Judicial Determinations in Nonadversary Proceedings, 72 Harv. L. Rev. 722, 724 (1959); 1 Witkin, Cal. Procedure (1954) § 10, p. 497."

There can be no serious question that the determination of the obscenity or nonobscenity of a motion picture is an appropriate subject for declaratory relief. Such determinations were made in Zeitlin v. Arnebergh, 59 Cal. 2d 902, and in Landau v. Fording, 245 Cal.App. 2d 820. In Zeitlin a book seller and a prospective purchaser were held entitled to a declaratory judgment declaring "Tropic of Cancer" was not obscene. In Landau the party owning the distribution rights to a motion picture, the obscenity of which was in question, brought a declaratory relief action to determine its status with respect to the obscenity law. A judgment declaring the picture obscene was

affirmed on appeal. In both of the above cases, of course, the direct economic interests of the persons involved eliminated any question of standing. It would appear, therefore, that if plaintiffs allege the existence of a controversy, they may be able to establish standing to seek a declaratory judgment by alleging "injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented."

From what is said above, it follows that the demurrer to plaintiffs' complaint was properly sustained. Plaintiffs alleged facts sufficient, if proved, to show the existence of a public nuisance, but they did not alllege facts establishing their standing to maintain a private action to abate it. Plaintiffs also failed to allege the existence of a controversy in which they have an interest of sufficient magnitude to justify declaratory relief in their behalf. It does not, however, appear that under such circumstances the demurrer should have been sustained without leave to amend. Nothing in the complaint suggests that the plaintiffs cannot amend to show special injury sufficient to justify the maintenance of a private suit to abate a public nuisance or a controversy with a potential for substantial injury to them

justifying their maintenance of a declaratory relief action.

The judgment of dismissal is reversed; the cause is remanded to the trial court with instructions to grant plaintiffs a reasonable time within which to file an amended complaint.

POTTER, J.

We concur:

FORD, P.J.

ALLPORT, J.

ORDER DUE
November 16, 1976

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, Civil No. 43778

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

HARMER ET AL.

v.

A MOTION PICTURE FILM ENTITLED
"THE DEVIL IN MISS JONES" ET AL.

Appellants' Petition for hearing DENIED.

SUPREME COURT
FILED
NOV 12, 1976
G. E. BISHEL, Clerk

_____
Deputy

/s/ WRIGHT
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of this Court this 14th day of February, A.D. 1976.

Clerk

By: /s/ R. D. BARROW
Deputy Clerk

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN HARMER, RAYMOND P. GAUER, SALVATORE MAIORINO, Plaintiffs and Appellants, A MOTION PICTURE FILM ENTITLED "DEEP THROAT" (35 mm. Color, English Sound Tract); VANGUARD FILMS, INC.; GERARD DAMIANO a.k.a. JERRY GERARD; LOUIS PERAINO a.k.a. LOU PERRY; GERARD DAMIANO FILM PRODUCTIONS, INC.; PHIL PARISI; AQUARIUS RELEASING CO., INC.; TERRY LEVINE; PUSSYCAT THEATRES, INC.; VINCENT MIRANDA; FRANK N. SELTZER; WALTER SELTZER; GEORGE GLASS; JAY FINEBERG; JACK CHAZAN; WALNUT PROPERTIES, INC.; ERNEST RICORD; BETTE LOU LEDFORD; ROBERT MATTIAS; JIM JOHNSON; PUSSYCAT HOLLYWOOD; PUSSYCAT (HOLLYWOOD) THEATRE; DOES 1 through 11, Defendants and Respondents.	2d Civil No. 43913 (Sup.Ct. No. C 63814)

APPEAL from orders of the Superior Court of Los Angeles County. David A. Thomas, Judge. Affirmed.

James J. Clancy for Plaintiffs and Appellants.

Fleishman, McDaniel, Brown & Weston

and David M. Brown for Defendants and Respondents.

Plaintiffs originally brought this action to enjoin the further showing of the motion picture "Deep Throat" by defendant Pussycat Hollywood Theatre (Pussycat) on the ground that the performances constitute a public nuisance and are violative of the California Red Light Abatement Law (Pen. Code, § 11225, et seq.). The trial court sustained a demurrer to the complaint against all three plaintiffs — without leave to amend as to Harmer and Gauer, and granting 30 days leave to amend as to Maiorino and thereafter entered order dismissing the complaint as to Harmer and Gauer (§ 581, subd. 3, Code Civ. Proc.). Earlier the trial court had entered order denying preliminary injunction. Although the notice of appeal states that all three plaintiffs appeal from both orders, we do not consider Maiorino to be a party to the appeal from the order of dismissal.[1/]

1/ Although the court file does not contain any amended complaint by Maiorino, neither does it contain any judgment or order of dismissal in respect to him.

Defendants Vanguard Films, Inc.,

On March 27, 1975, this court affirmed both orders. Thereafter plaintiffs' petition for hearing before the California Supreme Court was granted. Subsequently, the Supreme Court transferred the cause to this court for reconsideration in the light of People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42. While Busch requires reformulation of our earlier opinion, careful consideration of that case reveals it to be supportive of the result reached therein.

ORDER OF DISMISSAL

First cause of action re public nuisance.

The allegations, all non-conclusionary portions of which we accept as true, aver: Plaintiffs (Harmer and Gauer) reside "in near proximity" to the Pussycat, which is located at 7734 Santa Monica Boulevard, Hollywood, and Gauer's place of business, 5670 Wilshire Boulevard, is in "near proximity" thereto. Defendant Pussycat Theatres, Inc., is a corporation of which Fineberg is president and Miranda secretary, and Miranda, the Seltzers and Glass are shareholders; and

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Gerard Damiano a.k.a. Jerry Gerard, Louis Peraino a.k.a. Lou Perry, Gerard Damiano Film Productions, Inc., Phil Parisi, Aquarius Releasing Co., Inc., Terry Levine and Ernest Ricord did not demur. The record does not reveal whether any were served with process or became parties to this action.

the corporation "is deriving substantial revenues from the operation of" the Pussycat, and is Miranda's alter ego. Defendant Chazan is the record owner of the real property on which the Pussycat is located; defendant Walnut Properties is a corporation of which Miranda and Ledford are directors, and Mattias and Johnson "managers and overseers," and which corporation "is deriving substantial revenues from the operation of" the Pussycat, and is also Miranda's alter ego. Defendant Pussycat Hollywood is a corporation of which Miranda is president and Frank Seltzer secretary, which corporation "is deriving substantial revenues from the operation of" the Pussycat, and is Miranda's alter ego.

Commencing November 30, 1972, and continuously thereafter, to and including the filing date of the complaint (August 3, 1973), "certain of the defendants" caused daily advertising of the film "Deep Throat" to be placed in the newspapers in the City of Los Angeles, and commencing on or about November 30, 1972, "Defendants have exhibited and are exhibiting publicly the aforementioned motion picture film at the Pussycat. . . . "; an accurate time and motion study of "Deep Throat" is provided as an exhibit, and the subject matter of the film is "unlawful and contraband being obscene and

a public nuisance under both state and federal laws" (italics ours); the film "(1) taken as a whole appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct . . . demonstrated by the following visual depictions. . . ." (thereafter follows a list of various acts, including multiple references to cunnilingus, sexual intercourse, sodomy, fellatio and masturbation); "the near proximity of such public nuisances to Plaintiffs' residences, places of business, and play areas of their minor children establishes the same as a private nuisance as to each of the Plaintiffs and their minor children. Special injury and damages have been and will be suffered by Plaintiffs from such exhibitions of 'Deep Throat'"; (thereafter follow averments of "shame, embarrassment and emotional distress" and subjection to "the attraction of criminal elements, undesirables, deviates, dropouts from society and immoral persons into the areas; the decrease in value of real property . . . erosion of the public morality of the local community . . . the higher probability of an increase in sexual promiscuity, venereal disease, divorce and illegitimate births among the members of the community, the attraction of similar unsavory and unwholesome businesses"; a deprivation of plaintiffs' and their

minor children's civil rights and special damages in the form of the expenses in time and money for bringing this action); "Each and all of the foregoing acts and conduct in the use of Defendants' property, for the purposes and in the manner aforesaid, interferes with the tranquility, peace and quiet, generally, of Plaintiffs and the citizens in nearby community; constitutes a wilful, malicious, unlawful, unwarranted and unreasonable use of Defendants' property to the extreme annoyance, disturbance, discomfort and harm of Plaintiffs, and is detrimental to the public good and to the common welfare; such acts are offensive to public decency, morals, peace and health and constitute nuisances which should forthwith be enjoined and abated." Plaintiffs pray that such nuisance be forthwith abated and enjoined; and "an accounting be made of all box office receipts at the Pussycat . . . and the same forfeited to the County of Los Angeles as contraband."

Second cause of action re Red Light Abatement Law violation.

The foregoing allegations in the first cause of action concerning the advertising of "Deep Throat," a time and motion study of the film, the various sexual acts observed and that the movie is obscene, are repeated.

Additionally it is alleged: "Each and all of the foregoing acts and conduct in the use of Defendants' property, for the purposes and in the manner aforesaid, interferes with the tranquility, peace and quiet, generally of Plaintiffs and citizens in nearby community; constitutes a wilful, malicious, unlawful, unwarranted and unreasonable use of Defendants' property to the extreme annoyance, disturbance, discomfort and harm of Plaintiffs, and it is detrimental to the public good and to the common welfare; such acts are offensive to public decency, morals, peace and health, and constitute nuisances which should forthwith be enjoined and abated." Plaintiffs pray "That the Court order a forfeiture of the leasehold interest for one year as is mandated by Penal Code Section 11230, or such lesser period as is authorized by Penal Code Section 11232"; defendants be enjoined from "possessing, advertising, or exhibiting the motion picture film 'Deep Throat'"; and an accounting be made of the box office receipts and the same forfeited to the County of Los Angeles as contraband.

We quickly dispose of the second cause of action. As they must, plaintiffs agree that People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, squarely decides the issue. That case holds that the provisions of the Red Light

Abatement Law "were not intended to apply, and do not apply, to the exhibition of obscene magazines and films." (17 Cal. 3d at p. 62.)

As to the first cause of action, which pleads that the showing of "Deep Throat" constitutes a public nuisance (under section 3480, Civil Code) which plaintiffs, as private citizens seek to enjoin and abate,[2/] section

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2/ Plaintiffs in their opening brief state they "seek herein to establish the lawful right of a citizen of this state to maintain in a civil action to abate, as a public nuisance: (1) a hard-core, pornographic motion picture film ('Deep Throat') which is now, has been and is about to be exhibited on the screen of a public theatre in the County of Appellants' residence, and (2) the building or place where said film is being exhibited."

Although the first cause of action contains express averments that plaintiffs were also the victims of a private nuisance (in a degree sufficient to permit them to bring this action to enjoin the public nuisance under section 3493, Civil Code) they concede that their cause of action is brought "as individuals residing in Los Angeles County." The trial court, after an evidentiary hearing and consideration of memoranda of fact and law addressed specifically to this issue expressly requested by it, found there to be insufficient special injury to constitute a private nuisance. Because there was substantial evidence in support of this determination, we regard these allegations as constituting mere legal conclusions which we are not compelled to accept as true.

3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." In relation thereto it is settled that a private citizen fails to plead a cause of action to enjoin a public nuisance unless he avers special injury to himself of a kind different from that suffered by the general public. In City Store v. San Jose - Los Gatos etc. Co., 150 Cal. 277, the Supreme Court said, in construing section 3493 and sustaining a judgment of dismissal following a demurrer sustained with leave to amend (plaintiff declined to amend), "In order, therefore, to warrant the maintenance of an action by a private individual to abate or restrain the construction of a public nuisance, it is not enough to allege that injury has been or will be sustained by him thereby, but it is essential that it appear by proper allegations in the complaint, to be supported by proof upon the trial, that this injury, is or will be, special in character to him -- that is, that such injury will not only be greater in degree, but will be different in kind from that sustained by the public generally." (P. 279.) In Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App.

3d 116, in affirming judgment of dismissal following the sustaining of a demurrer without leave to amend, the court said at pp. 123-124: "The remedies against a public nuisance, i.e., the redress for the wrong to the community, are by indictment or information, a civil action, or abatement. (Civ. Code, § 3491.) Adverting specifically to the remedy by way of a civil action, since this is the remedy with which we are here concerned, we apprehend the law of this state to be that such action is ordinarily properly left to the appointed representative of the community and may be maintained by a private person only if the public nuisance is specially injurious to him. (Court's italics.) (Civ. Code, § 3493; see Code Civ. Proc., § 731; and see Prosser on Torts (3d ed.) at p. 608.) Section 3493 of the Civil Code specifically provides that 'A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.' (Italics added.) The genesis of this rule is found in the common law which recognized that 'the action would lie if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance.' (Prosser on Torts (3d ed.)

at p. 608.)

"In applying the rule articulated in section 3493 to a particular case, cognizance must be taken as to whether the public nuisance alleged is also a private nuisance, since this factor is important in determining how the statute is to be applied. The difference becomes important in view of the fundamental principle that a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser on Torts (3d ed.) at p. 594.)

"Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public. (Court's italics.) (Citations.) Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. (Citations.)"

Plaintiffs' inability to state the requisite special injury to themselves is most apparent when they characterize defendants'

activities as constituting a "moral nuisance." On the one hand they argue that where a moral nuisance per se is established as a matter of law, injury and harm to the general public are conclusively presumed. While that may be true, there is still lacking the special injury which would enable plaintiffs to seek abatement. On the other hand plaintiffs ask that we substitute for the statutory requirement of special injury only the necessity that there be a "bona fide adversarial dispute." However, on this matter the Legislature has already spoken in Civil Code section 3493.[3/]

In our previous opinion we stated

3/ Plaintiffs also ask us to adopt the dissent in Harmer v. Tonylyn Productions, Inc., 23 Cal.App. 3d 941 which declares that: "The . . . allegations of the complaint (essentially the same as those here) are sufficient to satisfy pleading requirements with respect to the element of special injury which is essential to establish appellants' capacity to maintain the action under Civil Code section 3493." (P. 949.) We note that the cause at bench has been before us on three prior occasions on petitions for writ of mandate, each of which was denied; and that the Supreme Court denied petition for hearing following denial on the third petition. We decline to follow plaintiffs' suggestion that we adopt their position under the guise of "judicial activism and judicial legislation."

that nowhere do we find support for the proposition "that private persons similarly situated to plaintiffs here may initiate and prosecute actions to enjoin the showing of obscene motion pictures as nuisances, at least without direct collaboration with public authorities." (Emphasis added.) We believe this same idea to be implicit in the Supreme Court's latest ruling on the subject: "Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community." (Emphasis added.) (People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42 at p. 55; see Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App. 3d 116, 123.)[4/]

4/ Plaintiffs' own citation of authorities from other jurisdictions is of little assistance to them. The cases typically name as plaintiff one or more public officials. To the extent that these cases might support the proposition that in the absence of special injury and without direct collaboration with public authorities an individual has standing to seek abatement as a nuisance of the public display of an obscene film, we are not bound thereby inasmuch as the

(Footnote continued on next page.)

We are not insensitive to plaintiff's quandary. They have witnessed the transformation of a pleasant residential neighborhood into what fairly can be described as a center of commercialized sex. There is no doubt that the inhabitants of the area view this as an unwelcome change; and it is not difficult to believe that the effects of this transformation are felt in neighboring areas and, in some sense, throughout the city as a whole. Paradoxically it is the very scope of the alleged harm that ultimately prevents plaintiffs from being able to state a cause of action. Commendably, plaintiffs have sought the aid of the law in dealing with what they see as a pervasive problem; there is no doubt in their minds that the law has been found wanting; however, the law is eminently capable of change. In recent years many legislatures have evidenced a growing willingness to confront pornography in its many forms, but this court cannot legislate nor can it reinterpret a law already authoritatively construed. Should the time now have arrived when the statutory requirement of special injury

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involved statutes differ from the California code sections here at issue. (Grolemund v. Cafferata, 17 Cal. 2d 679, 688; Estate of Riccomi, 185 Cal. 458, 463; Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 482.)

is to be read out of the law because of an allegation of moral nuisance, that pronouncement, with its potentially grave constitutional ramifications, must come from our Supreme Court.

ORDER DENYING PRELIMINARY INJUNCTION

On September 4, 1973, the trial court entered its minute order stating "The motion for preliminary injunction and for forfeiture (of the box office receipts) is denied." All three plaintiffs have included this order in their notice of appeal. Because thereafter on September 21, 1973, the trial court entered its order of dismissal based on its determination that the complaint and each of its counts does not state a cause of action, which adjudication we have affirmed, the propriety of the earlier denial of injunctive relief is thereby established as a matter of law. Nevertheless, even without the subsequent dismissal we would have been required to affirm the trial court's order of September 4, under the settled rule that "'(T)he granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion.'

(Citation.)" (Weingand v. Atlantic Sav. & Loan Assn., 1 Cal. 3d 806, 820; Continental Banking Co. v. Katz, 68 Cal. 2d 512, 527.) (And see U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal.App. 3d 68, 79.)

During their first oral argument before this court plaintiffs urged that the trial court abused its discretion, at least in denying Maiorino's motion for preliminary injunction, predicating their position on his testimony that the Pussycat Theatre is located "350 feet from the corner" where the home which he owns and in which he resides is situated. They contended that even if Maiorino had not shown any particular injury suffered by him different in kind from the general public,[5/] the mere proximity of his

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5/ We have carefully reviewed Maiorino's testimony and the only showing of particular injury we find therein is that patrons of the Pussycat had at times deposited litter "with the Pink Pussycat label on it, cartons of Dixie Cups, soda and pop that they purchased at the Pussycat Theater. . . .", on his property. However, there was no demonstration that this would not have occurred had the Pussycat shown exclusively G-rated films; and plaintiffs have not urged that the closing of the Pussycat -- rather than the invocation of some procedure less violative of the First Amendment safeguards to insure that the theater's patrons control their litter -- was compelled on this ground.

real property to the site of the public nuisance was sufficient in and of itself, to compel the court to grant the preliminary injunction, citing Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116. We find nothing in Venuto to support the theory that mere proximity of a plaintiff's real property to the situs of a public nuisance is sufficient to compel the trial court to grant injunctive relief abating the nuisance.

We agree that the necessary special injury may arise out of close proximity to a public nuisance; indeed plaintiff Maiorino consistently was granted leave to amend his complaint because of the fact of his ownership of property

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Maiorino also testified that he was "embarrassed by the presence of that film fare" in his neighborhood; the advertising sign on the theater was "offensive" to him; and "we don't even invite friends and associates to our house any more, because it is -- its just an unsavory neighborhood." But his further testimony, particularly on cross-examination, disclosed that he personally had never seen the film, and his overall "embarrassment" also stemmed from the presence in the area of a substantial number of other sex-oriented businesses of various types, all but two of which had commenced operation years before the initial showing of "Deep Throat". He testified that he had paid $19,700 for his home; but he also said that a house next door (we assume similar in value) had just sold for $25,000.

near the Pussycat Theatre. However, neither the cases cited by plaintiffs (Fisher v. Zumwalt, 128 Cal. 493, and Wade v. Campbell, 200 Cal.App. 2d 547), nor similar cases to the same effect hold that mere proximity to a public nuisance translates into special injury. Properly understood, these cases indicate that proximity to a public nuisance may be a condition enabling a plaintiff to demonstrate that an injury to the public is special as to him, not that proximity necessarily entails such special injury.

The orders are affirmed.

LILLIE, J.

We concur:

WOOD, P.J.

THOMPSON, J.

APPENDIX C

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

D-1

CALIFORNIA PENAL CODE

Chapter 7.5

§311. (Definitions)

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its

prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

APPENDIX E

CALIFORNIA CIVIL CODE

§3479. (Nuisance, what)
Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

§3480. (Public nuisance)
A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

APPENDIX F

CALIFORNIA CIVIL CODE

§3493. Remedies for public nuisance.
A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

§3495. How abated.
Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

APPENDIX G

CALIFORNIA CODE OF CIVIL PROCEDURE

§731. (Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance)

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

APPENDIX H

CALIFORNIA CODE OF CIVIL PROCEDURE

§527. (Time of granting injunction: Service: Preliminary injunction, notice, readiness for hearing, continuance, counter-affidavits and precedence)

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order.

When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all afficavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of such day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue,

it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

APPENDIX I

CALIFORNIA RULES OF COURT

Rule 977. Citation of unpublished opinions prohibited; exceptions.

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.